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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CITY OF HEMET, Petitioner, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; CONCERNED CITIZENS OF HEMET, an unincorporated association, Real Party in Interest.	E071097 (Super.Ct.No. MCC1800771) OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Richard J. Olberholzer[*] and Elden S. Fox[†], Judges. Petition is granted.

[*] Retired judge of the Kern Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[†] Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Burke, Williams & Sorensen, Amy E. Hoyt; Eric S. Vail, City Attorney, for Petitioner.

No appearance for Respondent.

DeLano & DeLano, Everett L. DeLano III, M. Dare Delano, and Tyler T. Hee, for Real Party in Interest.

In this matter, we have reviewed the petition, its exhibits, and the opposition filed by real party in interest (hereafter real party). We have determined that resolution of the matter involves the application of settled principles of law, and that the equities favor petitioners. We conclude that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

I.

BACKGROUND

This case arises in the context of a commercial development called the Rancho McHolland Project in the city of Hemet. Leading up to May 2018, petitioner City of Hemet was considering the project. Real party Concerned Citizens of Hemet (CCH), a citizens' group, filed a California Public Records Act (CPRA) (Gov. Code, § 6250, et seq.) request seeking related records. The City responded in June that it would gather responsive records, examine over 2,000 pages of emails for applicable exemptions, and would respond further by June 25. There followed an exchange of communications over the emails, which petitioner did not produce. On July 11, 2018,

real party filed a "Verified Petition for Writ of Mandate to Compel Compliance with Public Records Act . . . ."

On July 12, petitioner mailed real party a CD with responsive, non-exempt emails, and sent supplemental non-exempt emails on July 19. Petitioner did not produce a privilege log for the claimed exempt emails and opposed the mandate petition. On July 17 (during a hearing seeking expedited review on the mandate petition), the superior court set the hearing for July 23, ordered supplemental briefing, and for petitioner to produce a privilege log at that hearing. The privilege log petitioner produced was insufficient. At the July 23 hearing, Judge Olberholzer found that an *in camera* review of the disputed emails was necessary to determine whether attorney-client privilege applied and ordered them produced to the court by July 25.

Petitioner did not produce the emails and the trial court set a further hearing on August 22. Petitioner filed an *ex parte* application to reconsider on July 27. On July 31, Judge Fox denied the application and advanced the *in camera* review to August 20. Petitioner filed the instant petition on August 14 and requested an immediate stay. On August 16, 2018, we stayed the *in camera* review and invited a response.

II.

DISCUSSION

Preliminarily, the petition seeks a peremptory writ or other extraordinary relief and an alternative writ directing respondent court to vacate the order (of July 23, as amended

July 31). We presume petitioner seeks relief in mandate or prohibition. (Code Civ. Proc., §§ 1085, 1102.)

The superior court directed an *in camera* review of the withheld emails because the privilege log was inadequate to determine if privilege applies. The privilege log contains columns for "Bates" numbers; "Date"; "To" [listing names only]; "From" [listing names only]; "Subject Line"; and "Privilege/Exemption" [identifying claimed exemption]. The "Subject Line" entries are terse, with entries such as, "McHolland CUP," "Attorney for McHolland project," "Rancho McHolland work plan," "Rancho McHolland ALUC," and "Rancho McHolland Resolutions," among other similar statements. None is descriptive in any realistic way; at most, they simply identified that the email somehow related to the Rancho McHolland project. There is no other description of the subject or content of the emails on the privilege log.

The privilege log is attached to the declaration of Stephanie Gutierrez, an attorney acting as counsel of record. She identifies the emails as "written communications between City staff/CEQA consultants and me and/or Assistant City Attorney Erica Vega, acting in our capacity as legal counsel for the City. All of the Exempt Emails are written communications between the City and its legal counsel regarding legal questions and issues facing the City." She does not state that any email is confidential, nor describe any of the contents.

Petitioner argues, relying on *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 (*Costco*) and Evidence Code section 915, that production of documents

claimed to be attorney-client privileged may not be ordered for *in camera* review to determine whether they are privileged. (*Costco*, at p. 739; Evid. Code, § 915, subd. (a) ["the presiding officer may not require disclosure of information claimed to be privileged under this division . . . in order to rule on the claim of privilege . . . ."].)

Real party contends that petitioner waived the privilege by agreeing to an *in camera* review, failing to produce the emails or appear before the superior court, and not producing a privilege log. Real party is incorrect. The only three bases for a waiver are: (1) disclosing a privileged communication in a nonconfidential context; (2) failing to claim the privilege in a proceeding in which the holder has the legal standing and opportunity to do so; and (3) failing to assert the privilege in a timely response to an inspection demand. (*Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1126 (*Catalina*).) Real party does not contend that petitioner failed to assert the privilege, just that it did so improperly and failed to provide a privilege log. "[I]f a party responding to an inspection demand timely serves a response asserting an objection based on the attorney-client privilege . . . , the trial court lacks authority to order the objection waived even if the responding party fails to serve a privilege log, serves an untimely privilege log, or serves a privilege log that fails either to adequately identify the documents to which the objection purportedly applies or provide sufficient factual information for the propounding party to evaluate the objection. [Citation.]" (*Id.* at p. 1126.) Moreover, "[o]nce the objections [to production of privileged material] are timely asserted, the trial court may not deem them waived based on any deficiency in the

response or privilege log. [Citations.] Nor may the court overrule the objections unless it receives sufficient information to decide whether they have merit. [Citations.] *Instead, the court is limited to ordering further responses and imposing sanctions if the responding party acted without substantial justification in providing a deficient response or privilege log.* [Citations.]" (*Id*. at p. 1129, italics added.) Such sanctions may include "evidence, issue, and terminating sanctions, if the responding party continues to provide insufficient information." (*Id.* at p. 1131.)

Obtaining sufficient information—including a description of the content of the emails—is important because "not all communications with an attorney are privileged. Instead, the attorney-client privilege attaches only to confidential communication made in the course of or for the purposes of facilitating the attorney-client relationship. [Citations.]" (*Catalina*, *supra*, 242 Cal.App.4th at p. 1129, fn. 5.) "For example, the privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice [citation]; in that case, the relationship between the parties to the communication is not one of attorney-client." (*Costco*, *supra*, 47 Cal.4th at p. 735.) A simple statement in a separate declaration, as here, that the logged documents are "communications between the City and its legal counsel regarding legal questions and issues facing the City" does not clarify this issue. " 'Even a minimal statement such as "transmission of strategic documents/pleadings including analysis and legal assessment" . . . is sufficient. [Citation.]' " (*Catalina*, at p. 1123.) That is missing here.

An important point is that the instant case arises from a discovery demand under the CPRA. The source of the discovery demand in *Costco* is not clear, except that the parties were in a labor dispute and attempting to discover an opinion letter claimed to be attorney-client privileged. It does not relate to CPRA, and the California Civil Discovery Act is mentioned only peripherally; mostly, *Costco* analyzes the Evidence Code. *Catalina*, on the other hand, is based almost entirely on the Civil Discovery Act and cites the Code of Civil Procedure for discovery processes including claims of attorney-client privilege, the privilege log, requiring supplemental information therefor, and sanctions. Here, no party has cited to the Civil Discovery Act, nor to *Catalina*. However, a bridge ties CPRA discovery demands to discovery management under the Civil Discovery Act. (*City of Los Angeles v. Superior Court* (2017) 9 Cal.App.5th 272, 284-292.) In a finding of first impression, the court concluded "the discovery act applies to CPRA proceedings, [but] the right to discovery nonetheless 'remains subject to the trial court's authority to manage [and limit] discovery' as required. [Citations.]" (*Id*. at pp. 288, 291.)

In this light, the trial court should not have ordered *in camera* review of the claimed exempt emails; absent sufficient information in the privilege log to determine attorney-client privilege applied, the trial court should have ordered supplemental privilege logs, and imposed appropriate sanctions as necessary if the petitioner continued to provide inadequate information.

Accordingly, we have determined that the trial court abused its discretion in ordering *in camera* review of the allegedly privileged emails, and that the petition should be granted.

III.

DISPOSITION

Let a peremptory writ of mandate issue, directing the Superior Court of Riverside County to vacate its order of July 23, as amended July 31, 2018, directing production of the emails for *in camera* review in Riverside Superior Court case No. MCC1800771, and to proceed consistent with this opinion, including under *Catalina*, *supra*, 242 Cal.App.4th 1116. The temporary stay imposed by this court on August 16, 2018, is LIFTED. Each party to bear their own costs.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

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MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.